

1
2
3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON
6

7 HOLLAND & KNIGHT & RICHARD
8 PRICE,

9 Plaintiff,

10 vs.

11 ALAN DEATLEY,

12 Defendant.
13

No. CV-06-278-JLQ

ORDER ON DEFENDANT'S
MOTION TO VACATE STATUS
CONFERENCE & ORDER TO
FILE AS TO FRIVOLOUS
APPEAL

14 The Defendant's Motion To Vacate Status Conference previously set by this court
15 for August 30, 2007 is based upon a statement by attorney Leslie Powers that "he will
16 be sailing" at that time. Mr. Powers has not furnished the court with other suggested
17 dates for the Status Conference. Therefore, the court strikes the August 20, 2007 Status
18 Conference date and resets the Status Conference for telephonic hearing for Monday,
19 September 17, 2007 at 3 p.m. Because of this court's well-founded beliefs that the
20 Defendant and his counsel have attempted (successfully so far) to delay these matters,
21 the court will not entertain any further request for continuance of the Status Conference.

22 Counsel for the Defendant further suggests that this court may no longer entertain
23 dispositive motions, etc. by reason of the Defendant's appeal to the Ninth Circuit Court
24 of Appeals. However, this court's Order Denying Motions To Dismiss are not final
25 Orders and it appears the Notice of Appeal filed by the Defendant is nothing more than
26 another attempt to delay this matter. While as a general rule, the filing of a notice of
27 appeal divests a district court of jurisdiction over those aspects of the case involved in

1 the appeal, *Stein v. Wood*, 127 F. 3d 1187, 1189 (9th Cir. 1997), the denial of a motion
2 to dismiss based on lack of jurisdiction is not immediately appealable. *Kwai Fung Wong*
3 *v. United States INS*, 373 F. 3d 952,960 (9th Cir. 2004). This court's Order Denying
4 Motion To Dismiss was not a "final decision" that may be appealed pursuant to 28
5 U.S.C. § 1291. A "final decision" for purposes of § 1291 is a "decision by the District
6 Court that ends the litigation on the merits and leaves nothing for the court to do but
7 execute the judgment." *Duke Energy v. Davis, et al*, 267 F. 3d 1042, 1048 (9th Cir.
8 2001)(quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978)).

9 The Ninth Circuit has long recognized an exception to the rule that a Notice of
10 Appeal divests the District Court of jurisdiction over those portions of the case to which
11 the appeal is addressed. A frivolous or forfeited appeal does not divest the district court
12 of jurisdiction. *Marks v. Clarke*, 102 F. 3d 1012, 1017 n.8 (1996), citing *Chuman v.*
13 *Wright* 960 F. 2d 10105 (9th Cir. 1992). The district court may certify a frivolous appeal
14 as being "wholly without merit," which the appeal in this matter is since there is clear
15 diversity of citizenship jurisdiction. The Defendant has never denied that he is a citizen
16 of Colorado and neither Plaintiff in the two consolidated actions are residents of that
17 state. While this court's prior Order directing the filing of Answers remains in place
18 and the court will proceed with the September 17, 2007 Status Conference, on or before
19 September 10, 2007, each party shall file and serve a brief of not more than ten pages as
20 to whether this court should certify the Defendant's Notice of Appeal as being frivolous.

21 The Clerk of this court shall enter this Order and forward copies to counsel.

22 **DATED** this 15th day of August 2007.

23 s/ Justin L. Quackenbush
24 JUSTIN L. QUACKENBUSH
25 SENIOR UNITED STATES DISTRICT JUDGE
26
27
28